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In the Supreme Court of the United States

OCTOBER TERM, 1957

NATHANIEL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 591

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13–22) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1957 (Pet. App. 23). The petition for a writ of certiorari was filed on October 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could validly be imposed for illegal purchases of heroin and its receipt and concealment.

2. Whether the court's charge to the jury properly required findings as to the necessary elements to constitute these two separate offenses.

STATUTES INVOLVED

26. U. S. C. (1952 ed., Supp. IV) 4704 (a), Sec. 4704 of the Internal Revenue Code of 1954, 68A Stat. 550, provides:

> (a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U. S. C. (1952 ed., Supp. III) 7237 (a), Section 7237 of the Internal Revenue Code of 1954, 68A Stat. 860, provided as follows:

> (a) *Violation of law relating to opium and coca leaves and marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * *

21 U. S. C. 174, Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of November 2, 1951, 65 Stat. 767, provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]
>
> * * * * *
>
> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

---

[1] By the Act of July 18, 1956, c. 629, Title I, Secs. 103 and 105, 70 Stat. 568, 570, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense both under this statute and under Section 7237 of the Internal Revenue Code of 1954.

STATEMENT

Petitioner, Gladys Stamps, and Clarence Robinson were charged in a two-count indictment (R. 1–2)[2] returned in the United States District Court for the Eastern District of Missouri with (1) purchasing 224 grains of heroin other than in or from the original stamped package in violation of 26 U. S. C. 4704 (a) (*supra*, p. 2); and (2) receiving and concealing this heroin knowing that it had been imported contrary to law, in violation of 21 U. S. C. 174 (*supra*, pp. 2–3). The jury found all three defendants guilty on both counts (R. 6; Tr. 221–222). Petitioner was given consecutive sentences of five years' imprisonment and a $1.00 fine on each count, making an aggregate sentence of ten years' imprisonment and a $2.00 fine (R. 9; Tr. 243). On appeal (R. 10), petitioner's conviction was unanimously affirmed (Pet. App. 23).

Evidence adduced at the trial may be summarized as follows:

On February 8, 1956, at about 2:00 a. m., two St. Louis police officers, named Robinson and Foxworth, looked into separate windows on the ground floor of an apartment at 4567 McMillan Avenue (Tr. 27, 31, 46–47, 68–69). Officer Robinson saw defendant Stamps standing alongside the defendant Robinson, who was seated next to a bed on which there was white powder on a mirror (Tr. 32, 33). Defendant Robinson had his hands in this powder (Tr. 61). Officer Foxworth saw petitioner looking at something he was holding in his left hand and over which he made a motion with his

[2] "R." refers to the paginated record. "Tr." refers to the typewritten transcript of the trial proceedings.

right hand (Tr. 69–70, 87, 103–104). When the officers went to the door of the apartment and announced from the hallway that they were police officers, petitioner and the other two defendants escaped through a window (Tr. 35–36, 71–72). The officers recovered the powder on the mirror, some filled capsules, a box of empty capsules, eye droppers, needles, and a flour sifter. Some capsules were taken from a coat found in the room (Tr. 37–42, 73–77). The officers turned this evidence over to the federal narcotics authorities. (Tr. 111–114). It was shown that the powder on the mirror was heroin, and that about 174 capsules were filled with heroin (Tr. 15–17, 111–113). There was no evidence of any taxpaid stamps for these narcotics. The heroin and paraphernalia were introduced in evidence as Exhibits 1, 2, and 3 (Tr. 122).

Petitioner's defense was an alibi. Petitioner and Miss Stamps both testified that he was not present in the room at 4567 McMillan on the night of the raid (Tr. 146, 126). Miss Stamps and Gola Mason testified that Mason (not petitioner) was the person with her and Robinson on that night (Tr. 126, 152–154).

In the charge to the jury, the trial judge read the pertinent provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174 (*supra*, pp. 2–3), and the two counts charged in the indictment under these sections (Tr. 197–200). Continuing, the court instructed (Tr. 200):

> So the question under each count of this indictment resolves down to whether or not the defendants, or either of them did possess this narcotic drug on the 8th day of February of this

year, out there in the room at 4567 McMillan, identified here in evidence.

Later in the charge the court instructed (Tr. 205-207):

> Now, under the law as provided for the offense charged in Count 1 of the indictment, for the unlawful purchase of a narcotic drug, the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found. So, if you find and believe from all the evidence, beyond a reasonable doubt, that the defendants, or either of them, possessed the narcotics mentioned in Count 1, and that the said narcotic did not bear the required Internal Revenue tax stamps, then you will find the defendants, or either of them, guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.
>
> Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction, as used in the statute, is meant that if the defendants, or either of them, had possession of

the narcotic drug they will have to explain that it came to them legally, and without that explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient if the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

ARGUMENT

1. Petitioner contends that the prosecution proved only the single fact of possession of the heroin, and that since, at most, only one offense was provided, it was error to impose the cumulative sentences of five years' imprisonment on each count (Pet. 7–10, 12).

Under established decisions, separate and consecutive sentences for violation of the two statutes involved were properly imposed, even though each offense arose from the same act. Each offense required proof of a fact which the other did not. Cf. *Blockburger* v. *United States*, 284 U. S. 299, 304;

Gore v. *United States,* 244 F. 2d 763 (C. A. D. C.), pending on petition for certiorari (No. 76 Misc., Oct. Term, 1957). As we have discussed in the brief in opposition in *Gore,* the recent decisions on the issue of multiple offenses (*Prince* v. *United States,* 352 U. S. 322; *Bell* v. *United States,* 349 U. S. 81; *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218) have scrupulously refrained from overruling *Blockburger* or rejecting generally its rationale. This Court, on the same day it handed down the *Prince* decision (February 25, 1957), declined to review a decision as to separability of narcotics offenses. *United States* v. *Johnson,* 235 F. 2d 159 (C. A. 7), certiorari denied, 352 U. S. 1006 (see the government brief in opposition, No. 345 Misc., Oct. Term, 1956).[3] Enactment of the Boggs Act (65 Stat. 767), which was designed to increase penalties for narcotics violations, certainly had no effect on the doctrine of separate offenses laid down by *Blockburger.* See *United States* v. *Brisbane,* 239 F. 2d 859 (C. A. 3); *United States* v. *Lewis,* 227 F. 2d 524 (C. A. 2), certiorari denied, 350 U. S. 974; *Everett*

[3] This was three months after the Court had granted certiorari in the *Bartkus*, *Hoag*, and *Ladner* cases (see Pet. 10). *Bartkus* involves issues of double jeopardy between different sovereignties, state and federal. *Hoag* presents issues of double jeopardy where a defendant, acquitted of robbery of several persons, was retried for the robbery of another, present at the same time, who had testified as a witness at the first trial. *Ladner*, the federal case, raises an issue as to the validity of multiple sentences for interfering with federal officers by the wounding of two officers riding in the same car. This Court indicated in *Prince* v. *United States*, 352 U. S. at 325, that, in general, decisions in this field would be confined to the particular statute involved.

v. *United States*, 227 F. 2d 457 (C. A. 6); *Beacham* v. *United States*, 218 F. 2d 528 (C. A. 10).

Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174 when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, had occurred.

2. a. Petitioner asserts that the court's charge was erroneous in that it equated both offenses, *i. e.*, the purchase, and the receipt, and concealment, of the heroin, with mere possession (Pet. 10–11). Petitioner makes this argument by emphasizing and taking out of context the part of the charge stating that "the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug * * * " (Tr. 200).

The charge as a whole made clear the separate nature of the two offenses. The judge carefully read both statutes to the jury (Tr. 197–199), and specifically read count one as charging that petitioner did "purchase" the narcotics, and count two, that he did "receive and conceal, and facilitate [their] concealment" (Tr. 199, 200). Shortly thereafter, the court's charge required findings that petitioner performed "the acts complained of" before he could be found guilty (Tr. 201). The charge also pointed out the government's position that petitioner purchased

the narcotics under count one, and received and concealed them under count two (Tr. 204, 205, 206). Of course, both counts are, under the applicable statutes, supported by the presumption arising from possession, so that the judge properly referred thereto. But the judge also made clear that there was both direct and circumstantial evidence in the case (Tr. 207–210), and that there was to be a separate verdict as to each count (Tr. 218–219).

b. There is no merit in petitioner's contention that under the charge (see Tr. 205–207; *supra,* pp. 6–7) the jury could have found all defendants, including petitioner, guilty, if they found only that "either of them" had possession (Pet. 11). Nowhere did the court instruct that, if either had possession, all should be convicted; nor did the court instruct that if either had possession all must explain possession. Rather, the instructions stated that either, or all, or none of the defendants might be in possession. Other parts of the charge, moreover, clearly indicated that each defendant's guilt or innocence was to be determined separately. Thus, the court charged, "The burden of proving the guilt of each of the defendants rests upon the prosecution" (Tr. 202); and "* * * each of the two counts of the indictment constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of each defendant separately" (Tr. 218).

It is significant also that, at the conclusion of the court's charge, counsel for petitioner announced that he had "no exceptions" (Tr. 220). Having failed to make in a timely manner the objections now advanced,

petitioner is in no position to urge them now. See Rule 30, F. R. Crim. P.;[4] *United States* v. *De Marie*, 226 F. 2d 783, 787 (C. A. 7), certiorari denied, 350 U. S. 966.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Attorneys.

NOVEMBER 1957.

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[4] Rule 30 provides in part: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 124–131) is reported at 248 F. 2d 196.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1957 (R. 32). The petition for a writ of certiorari was filed on October 31, 1957, and granted on June 30, 1958 (357 U. S. 935). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could validly be imposed for (a) purchase of heroin from an unstamped package and (b) receipt and concealment of

the same heroin knowing it to have been unlawfully imported, upon a showing that petitioner was in possession of unstamped heroin.

2. Whether the court's charge to the jury properly required findings as to the elements necessary to constitute these two separate offenses.

STATUTES INVOLVED

26 U. S. C. (1952 ed., Supp. V) 4704 (a), Sec. 4704 of the Internal Revenue Code of 1954, 68A Stat. 550, provides:

> (a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U. S. C. (1952 ed., Supp. III) 7237 (a), Section 7237 of the Internal Revenue Code of 1954, 68A Stat. 860, provided as follows:

> (a) *Violation of law relating to opium and coca leaves and marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000

and imprisoned not less than 10 or more than 20 years. * * *

21 U. S. C. 174, Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of November 2, 1951, 65 Stat. 767, provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]
>
> * * * * *

[1] The Narcotic Control Act of 1956, 70 Stat. 567, was enacted on July 18, 1956, after commission of the offenses here in question and after petitioner's conviction, and thus is not applicable to this case. By that Act, 70 Stat. 568, 570, c. 629, Title I, Secs. 103 and 105, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense under this statute. This Act also amended Section 7237 of the Internal Revenue Code of 1954, increasing the maximum penalties for violation of Sec. 4704 (a) to 10 years for a first offense, 20 years for a second offense and 40 years for a third or subsequent offense.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Petitioner, together with Gladys Stamps, and Clarence Robinson, was charged in a two-count indictment (R. 1–2) returned in the United States District Court for the Eastern District of Missouri on February 17, 1956 with (1) purchasing 224 grains of heroin other than in or from the original stamped package in violation of 26 U. S. C. 4704 (a) (*supra,* p. 2); and (2) receiving and concealing this heroin knowing that it had been imported contrary to law in violation of 21 U. S. C. 174 (*supra,* p. 3). Following a jury trial, on April 17, 1956, all three defendants were found guilty as charged (R. 121). Petitioner was given consecutive sentences of five years' imprisonment and a one dollar ($1.00) fine on each count (R. 122–123). On appeal, petitioner's conviction was unanimously affirmed (R. 132).

Evidence adduced at the trial may be summarized as follows:

1. On February 8, 1956, at about 2:00 a. m., officers Robinson and Foxworth of the St. Louis Police Department, while on their beat, looked from the outside through separate windows into the ground floor apartment at 4567 McMillan Avenue (R. 12, 14–15, 38–39).

Officer Robinson testified that he saw defendant Robinson seated next to a bed, with defendant Stamps standing alongside him (R. 15–16). He was able to see a mirror on the bed upon which there was white powder (R. 16). Defendant Robinson had his hands in the powder and defendant Stamps was watching him (R. 34). Officer Foxworth, from his vantage point, saw petitioner looking at something he was holding in his left hand over which he made a motion with his right hand (R. 39–40, 62). Immediately following their surveillance, the officers went to the door of the apartment and officer Foxworth announced that they were police (R. 16–17, 41). The officers heard a shuffling in the apartment and, by the time they gained entry, petitioner and the other two defendants had escaped through a window (R. 17–18, 41–42). The officers recovered the white powder on the mirror, 169 filled capsules, a box of empty capsules, eye droppers, syringes, needles and a flour sifter, and 5 loose capsules taken from a coat in the room (R. 4–7, 18–23, 42–44, 54). Of course, no tax stamps were, or could have been, affixed to the loose powder or capsules. As officer Foxworth testified, it was "impossible to mark the capsules" (R. 54).

Thereafter, at about 10:00 a. m. the same morning, officer Robinson turned over this evidence to federal narcotics agent Bernard A. Theisen, Jr. (R. 24, 67–69). The powder found on the mirror was tested and found to contain heroin. The capsules were also tested and found to be filled with heroin (R. 5–6, 67–69). The

heroin and paraphernalia were identified as Exhibits 1, 2 and 3 (R. 4–6, 20).

2. Petitioner's defense was an alibi. Petitioner and defendant Stamps both testified that he was not in the room at 4567 McMillan on the night of February 8 (R. 75–77, 86–88). Petitioner testified that he spent the night at the home of Grace Draper (R. 86–87; see, also, the testimony of Grace Draper, R. 82–86). Miss Stamps and Mr. Gola Mason testified that Mason (not petitioner) was the person with her and Robinson on that night (R. 76, 92–95).

Agent Theisen testified that shortly before the trial defendants Robinson and Stamps informed him that petitioner had been with them in the room at 4567 McMillan on the night of the raid and that the heroin belonged to petitioner (R. 71, 73).

3. Early in his charge to the jury, the judge read the relevant provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174 (*supra*, pp. 2–3), and the two counts which were drawn under these sections (R. 105–107). The court then observed (R. 107):

> So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence.

The trial judge thereafter explained the presumptions, under these two statutes, by instructing as follows (R. 110–111):

> Now, under the law as provided for the offense charged in Count 1 of the indictment, for

the unlawful purchase of a narcotic drug, the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found. So, if you find and believe from all the evidence, beyond a reasonable doubt, that the defendants, or either of them, possessed the narcotics mentioned in Count 1, and that the said narcotic did not bear the required Internal Revenue tax stamps, then you will find the defendants, or either of them, guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.

Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction, as used in the statute, is meant that if the defendants, or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without that explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need

not be personal and exclusive. It need not be immediate. It is sufficient if the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

The court made plain that the presumption of innocence "applies to every element of the charge against a defendant, and remains with the defendants, and each of them, until the evidence in the case overthrows it, and [the jury is] satisfied beyond a reasonable doubt that any defendant is guilty of the charge set forth in the indictment" (R. 108); and that "in order to find the defendants, and each of them, guilty, you must not only believe that the defendants, and each of them, did the acts complained of, and of which the defendants, and each of them, stand charged, but you must also believe that the acts were intentionally and knowingly done by such defendants, and each of them" (R. 108).

Petitioner took no exceptions to the charge (R. 120).

4. The Court of Appeals unanimously affirmed the conviction, noting that "[t]he jury was sufficiently and correctly instructed of what it was necessary for them

to find from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment" (R. 124–131, 128).

SUMMARY OF ARGUMENT

I

In *Gore* v. *United States,* 357 U. S. 386, this Court held that consecutive sentences could validly be imposed for three separate violations of three different statutory requirements with respect to narcotics even though the three offenses derived from one act of sale. Here, petitioner was convicted of, and given consecutive sentences on, two of the three offenses involved in *Gore.* On the question of the separateness of the offenses we see no distinction between the two cases.

The case is not significantly different from *Gore* because here the jury was permitted to find petitioner guilty of each offense on proof of possession and the presumptions arising therefrom. In this case possession created a presumption of violation of two different statutory requirements, just as in *Gore* possession created the same presumption of violation of the same requirements. See the dissenting opinion of Mr. Justice Brennan, 357 U. S. 397–398. The only count involved in *Gore* not present here is sale without a written order (26 U. S. C. (Supp. V) 4705 (a)) which must be proved only by direct evidence without resort to any presumption. Thus, it makes no difference, for the purposes of this case, whether the single transaction which proves the offenses happens to be a sale or simply possession. The important question is whether

the requirements separately imposed by Congress in separate statutes have been violated, as the jury found.

II

There was no error in the judge's charge. The judge carefully read both statutes to the jury and delineated the separate presumptions under each statute, noting that under count 1 the crucial fact giving rise to the statutory presumption was the absence of appropriate tax-paid stamps on the possessed narcotics, whereas under count 2 possession of narcotics would be deemed sufficient evidence to authorize conviction unless the possession was explained. He told the jury that they must find the petitioner "did the acts complained of", that each count constituted a separate charge, and that a separate verdict was to be returned as to each count.

There was no greater emphasis on possession than the statutes require. And if there had been, it could not have injured petitioner. At most, by emphasizing possession, the court would have limited the jury's consideration of both counts to the statutory presumptions and so removed from the case any consideration the jury might have given to petitioner's flight as evidence of his guilty knowledge. Emphasis on the importance of possession was consistent with petitioner's sole defense, which was not an attempt to explain or justify that possession, but to deny that he ever had it because he was not present when the premises were raided. Significantly, petitioner's trial attorney made no objection to the charge. Petitioner's present objections come too late. Rule 30, F. R. Crim. P.

ARGUMENT

I

UNDER GORE V. UNITED STATES, 357 U. S. 386, THE TWO OFFENSES HERE INVOLVED WERE SEPARATE EVEN THOUGH THEY AROSE OUT OF ONE ACT.

In the instant case, petitioner was given consecutive sentences under a two-count indictment charging (1) purchase of heroin other than from the original stamped package in violation of 26 U. S. C. 4704 (a), *supra*, p. 2, and (2) receipt and concealment of this heroin knowing that it had been imported contrary to law in violation of 21 U. S. C. 174, *supra*, p. 3.

In *Gore* v. *United States*, 357 U. S. 386, the defendant was given consecutive sentences for three offenses. The offenses were (1) sale not pursuant to a written order form; (2) purchase, sale and distribution not in or from a stamped package; and (3) transportation and concealment of illegally imported narcotics. In upholding the consecutive sentences, the Court assumed that the three offenses "derive from a sale", *i. e.*, from one transaction (see 357 U. S. at p. 837). It said:

> It is one thing for a single transaction to include several units relating to a proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the sub-

stantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

The Court held that there was no occasion for application of the rule of lenity because the history of the three statutes involved, their separate enactments at different times, and the purpose to tighten controls, all demonstrated the Congressional intent to permit separate punishment for the different violations in the one act of sale. The majority opinion states, 357 U. S. at p. 389: "The fact that an offender violates *by a single transaction* several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic" (emphasis added).

The two offenses here charged are two of the three offenses before the Court in *Gore*. (The only offense present in *Gore* not present here is sale not pursuant to a written order form (26 U. S. C. (Supp. V) 4705 (a)) which must be proved only by direct evidence without resort to any statutory presumption.) On the question of the separateness of the offenses, we see no distinction between the two cases.

Petitioner attempts to distinguish this case from *Gore* on the grounds that the record here shows that the trial judge permitted the jury to find petitioner guilty of each offense merely on proof of possession and the presumption arising therefrom. That does not distinguish this case from *Gore*. While *Gore* arose in the context of a proceeding under 28 U. S. C.

2255, the record of the trial was before the Court, including the instructions on the presumptions arising from possession which were, as were the instructions here, based on the statutory language.[2] As noted, the decision in *Gore* is based on the assumption that all that the government proved was one act of sale with the possession involved in that one act of sale. The decision is, as the quotations already given clearly demonstrate, bottomed upon the assumption that only a single transaction was proved.[3] The Court found that so long as the three requirements proscribed by the three different statutes were violated—*i. e.*, so long as the narcotics were illegally imported, so long as there was no order form, and so long as there was no stamped package—there were three offenses, although there was only one act with respect to exactly the same narcotics. That is the situation here. Assuming that the possession which gives rise to the presumption is exactly the same under each statute,[4] that

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[2] We have relodged the transcript of the trial in *Gore* with the Clerk of this Court. See pp. 83–84 of that transcript.

[3] In *Blockburger* v. *United States*, 284 U. S. 299, the offender was charged, convicted, and cumulatively sentenced for selling narcotics not in the original stamped package and not in pursuance to a written order. Both offenses derived from a single sale. The case came to this Court on direct appeal and it was held that the offenses were separate and separately punishable. The decision in *Gore* rested, in large part, upon this earlier decision—this Court saying "We adhere to the decision in *Blockburger* v. *United States*" (357 U. S. at 388). There was no intimation that affirmance of the legality of the term of imprisonment rested on the narrower scope of review available on a motion to correct sentence as against direct appeal.

[4] Under 21 U. S. C. 174, proof of possession alone is presumptive evidence of illegal importation. Under 26 U. S. C. 4704 (a), the presumption arises from the absence of stamps

possession nevertheless proves violations of two different statutory requirements. It shows a purchase without stamps, and a handling of narcotics which had been illegally imported. And, as already noted, *Gore* holds "the fact that an offender violates by a single transaction several regulatory controls * * * does not make the several different regulatory controls single and identic." We cannot see that it makes any difference whether the single transaction which proves the offenses happens to be sale or possession.[5]

The important question is whether the requirements separately imposed by Congress in separate statutes have been disregarded by the defendant. Here, these separate requirements have been violated, and separate punishment is therefore, under the *Gore* decision, clearly authorized. If this Court had found that there was ambiguity with respect to the Congressional intent so as to justify application of the rule of lenity,[6] then it would have been necessary to decide whether there was presented the factual situation of one single transaction to which that rule relates. Cf. *Ladner* v.

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on drugs to make out a presumptive violation "by the person in whose possession" the drugs are found. Possession of unstamped drugs would, as petitioner argues, be sufficient to give rise to the presumption under each statute. See the dissenting opinion of Mr. Justice Brennan in *Gore*, 357 U. S. at 397.

[5] Where there is direct evidence of a sale, the jury may credit that testimony as well as resort to the statutory presumption with respect to 21 U. S. C. 174 and 26 U. S. C. 4704 (a). See the government's brief in *Greene* v. *United States*, No. 134, pp. 18–19. So long as the jury is charged, as it was in *Gore* (Tr. 83–84), that it may convict on the statutory presumption alone this does not serve to distinguish the sale from the possession cases.

[6] Cf. the dissenting opinion of the Chief Justice in *Gore*.

United States, No. 2, this Term, decided Dec. 15, 1958, in which this Court remanded the case to the district court for a hearing to determine the factual situation disclosed at the trial. There might then have been some materiality in petitioner's argument that possession and the presumptions arising therefrom are, in practical effect, so integral a part of the government's proof that (even though the possession is only evidence of an element of the offense, and not an element of the offense itself) one possession should not be allowed to give rise to more than one offense.[7] But in view of the precise

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[7] Under the general rule that courts look to the elements of the offense as defined by Congress and not to the proof of these elements, the courts have emphasized that possession is not made an offense under any of the statutes, but merely evidence of the proscribed acts which can be discrete. *E. g.*, *Corollo* v. *Dutton*, 63 F. 2d 7, 8 (C. A. 5):

"Each count charges a separate and distinct offense. Each count requires to make it out, proof of a fact additional to that required to make out the offense under the others. Subdivision (f) of Section 1 of the statute (Act of May 26, 1922 [21 U. S. C. § 174] does indeed provide that proof of possession alone makes a prima facie case under each count * * *. This subdivision does not define the substantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, prima facie, of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. *It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same.* An examination of them shows that quite the contrary is true. The fact essential in proof of the second count is the purchase of morphine not in or from the original stamped package. The essential fact in the third count is the sale of morphine not in pursuance of a written order. The essential fact in the fourth count is knowingly receiving and

holding in *Gore* that the offenses are separate *even if arising out of the same transaction,* the fact that the offenses are proved by the same evidence is clearly immaterial.

In a particular case, two clearly separable offenses, such as destruction of property and the taking of life, might be proved by the same evidence of one act, such as the throwing of a rock through a window. This would not make the two offenses the same. So here, as long as the offenses were intended by Congress to be separate, it makes no difference how the proscribed conduct is proved. If proof of one sale, which may be an ingredient of each of the three offenses, will support separate punishments, then proof of one possession, which is only evidence of the violations, can as well support separate punishments. Congress has said in separate statutes that concealing unlawfully imported narcotics and buying narcotics not from a stamped package are separately punishable. Proof of possession of unstamped narcotics[8] would show both

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concealing morphine which had been unlawfully imported into the United States. The case falls directly within, and is controlled by, the Blockburger Case, * * *." (Emphasis added.)

To the same effect see *McDade* v. *United States*, 206 F. 2d 494, 495 (C. A. 6), certiorari denied, 346 U. S. 889; *Velasquez* v. *United States*, 244 F. 2d 416, 418 (C. A. 10).

[8] There is no question that the narcotics which the government claimed were in petitioner's possession in loose powder and capsule form were, in fact, unstamped. (R. 126–127 [opinion below].) See p. 5, *supra*. Cf. *Casey* v. *United States*, 276 U. S. 413, 417, where narcotics were sent by soaking towels in a solution of the drug. Mr. Justice Holmes, writing for the Court, said "* * * it safely may be inferred that he [petitioner] did not proclaim his illegal purpose by putting stamps upon the towels."

that the drugs were bought from an unstamped package and that there had been a receipt and concealment of drugs which had been illegally imported—that the purchase and stamp requirements of one section, and the handling and illegal importation requirements of the other, had been violated. Two separate offenses were therefore committed even if both were proved by the one act.[9]

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[9] Petitioner raises a question (Pet. Br. 15) as to whether one possession can be relied upon to prove separate offenses under the same statute, *e. g.*, separate counts for buying, selling and illegal concealment under 21 U. S. C. 174. That issue is not here involved. In this case, petitioner was charged with only a single offense under each statute, and there certainly can be no valid claim here that possession of unstamped narcotics, where unexplained, may not, on the one hand, logically be deemed to warrant the conclusion that these narcotics were not purchased in or from the original stamped package in violation of Section 4704 (a), and, on the other, that such unexplained possession may not authorize conviction for receipt and concealment of narcotics with knowledge of their illegal importation. *Casey* v. *United States*, 276 U. S. 413; *Yee Hem* v. *United States*, 268 U. S. 178.

As we have pointed out *supra*, p. 16, the rule of lenity does not make one offense out of two clearly separable acts occurring at two different times, motivated by separable impulses. Cf. *Ladner* v. *United States*, No. 2, this Term, decided Dec. 15, 1958. Hence, if such separable acts as purchase and sale are shown to have occurred at different times, there is no reason why they should not be two separate offenses even under the same statute. Whether proof of only one of those acts, or proof only of possession, justifies the conclusion that such separable acts as purchase and sale occurred so as to constitute multiple violations of a single statute is a question which is not here presented. See the government's brief in opposition in *Yancy* v. *United States*, No. 64 Misc., O. T. 1958.

II.

THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER.

Much of petitioner's argument goes to the very limited question of whether, in this case, the trial judge properly instructed the jury. He contends that the charge contained fatal error because no differentiation was made between the two offenses—the jury being directed to find the defendants guilty under both statutes upon the single fact of possession (Pet. Br. 14, 17–20, 23, 30). In support, petitioner particularly emphasizes that portion of the charge to the effect that "the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug * * *" (R. 107). He reasons from this that the jury was foreclosed from finding any different elements in the two offenses, and therefore that consecutive sentences could not be imposed. His challenge, however, does not withstand analysis.

1. At the outset of the charge, the judge read both statutes to the jury (R. 105–106) and specifically distinguished the two counts which he also read to the jury. (R. 107). The judge also delineated between the separate presumptions under each statute, noting that, under count one, the crucial fact giving rise to the statutory presumption was "* * * the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession * * *" (R. 110), and that, under count two, "possession of such drugs * * * shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defend-

ants, or either of them, explain their possession to your satisfaction" (R. 111). He then went on to instruct as to the difference between direct and circumstantial evidence (R. 112–113), significantly pointing out to the jury that it was their task to deduce from all the facts and circumstances whether defendants were guilty beyond a reasonable doubt. The jurors were required to "believe that the [petitioner] * * * did the acts complained of * * *" (R. 108) before they could convict and were finally cautioned that each count constitutes "a separate charge" and a separate verdict was to be returned on each charge (R. 118–119). In totality, then, the instructions specifically informed the jury of the elements of each offense. Petitioner is therefore in error when he compares this charge with that deemed invalid in *Morris* v. *United States,* 156 F. 2d 525, 528 (C. A. 9), where the Court of Appeals found that the trial court had failed to "define the offense of which the appellant was charged and was being tried. * * *." Here, the law of the case as to the separate offenses was spelled out on several occasions.

In his reference to possession, the trial judge was merely following the directives of the two statutes. But he did not, as petitioner would have it, stop there. He not only read each statute as well as each count in full (R. 106–107), but he spelled out the effect and purpose of each presumption (R. 110–111), and he required further that the jury find the defendants guilty of each count in a separate verdict (R. 118–119). Thus, while the court made the key factor possession, it did not equate that fact with the gist

of the offenses, but merely advised the jury that the ultimate elements of the offenses could be inferred therefrom.

2. There was no greater emphasis on possession than the statutes require. But if there had been, it could not have injured petitioner. At most, by emphasizing possession the court limited the jury's consideration of both counts to the statutory presumptions and so removed from the case any consideration the jury might have given to petitioner's flight from the premises at 2:00 a. m. as evidence of his guilty knowledge. See *United States* v. *Heitner,* 149 F. 2d 105, 107 (C. A. 2); *United States* v. *Rosenberg,* 195 F. 2d 583, 600 (C. A. 2), certiorari denied, 344 U. S. 838. Moreover, as far as petitioner was concerned, the directive that the jury could not convict without finding possession had the effect of placing emphasis on petitioner's alibi defense. Petitioner did not attempt to explain or justify an admitted possession of the narcotics but contended that he was never at the raided premises and never possessed of the heroin there found. Significantly, at the conclusion of the court's charge, counsel for petitioner announced that he had "no exceptions," apparently recognizing that the charge was as favorable to his clients' cases as he could expect.

3. Petitioner's further challenge to the instructions, first, that the trial judge directed the jury to return a conviction on proof of possession (Pet. Br. 30), and, second, that the jury under the instructions could have found any one of the defendants guilty, includ-

ing petitioner, if they found that any one of them had possession of the heroin, are without merit.

The first attack is baseless since the judge did not direct that the jury must convict on a showing of possession. Thus, as to count 2, he specifically charged the jury that if they found unexplained possession they "would be authorized" to convict (R. 111). Although, as to count 1, he advised that if the jury found the defendants possessed of narcotics "You will find" them guilty and "Unless you so find, you will find the defendants, and each of them, not guilty," he was not issuing a mandatory directive, for this phraseology was immediately preceded by the statement that "possession shall be prima facie evidence of a violation" (R. 110–111). Against this background, his use of the word "will" was nothing more than a short-hand manner of expressing the inference the jury could draw from possession in a case in which the defense made no attempt to justify or explain that possession.

As to the second challenge, nowhere did the trial judge instruct that if any one co-defendant had possession all could be convicted. Rather, the court charged, "* * * you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2" (R. 111); and "* * * each of the two counts of the indictment constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of each defendant separately" (R. 118).

4. While there are exceptions to the normal rule set forth in Rule 30, F. R. Crim. P. that "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection" (see *Screws* v. *United States,* 325 U. S. 91, 107), they do not apply here. As we have observed, the instructions were fairly in accord with the mandate of Congress and, if anything, more favorable to petitioner than his case warranted. He should not now be allowed to complain when at the trial, in response to direct inquiry by the trial judge, and with full opportunity to do so, his counsel chose not to complain. Cf. *Johnson* v. *United States,* 318 U. S. 189, 200.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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